IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22/04/2004

CORAM

THE HONOURABLE MR. JUSTICE A.S. VENKATACHALAMOORTHY
AND
THE HONOURABLE MR. JUSTICE P.K. MISRA

WRIT APPEAL NO.852 OF 2002

1. The Secretary,
Ministry of Railways,
New Delhi.

2. The General Manager,
Southern Railway,
Chennai 600 003. .. Appellants

-Vs-

1. Smt.S. Santhanamary

2. Shri B. James
34, Seniamman Koil Street,
V.O,.C. Nagar, Chennai 81.

3. The Union of India,
Rep. by the Home Secretary,
New Delhi.

4. The Home Secretary,
State of Tamil Nadu,
Fort St. George,
Chennai 600 009.

5. The Collector of Chennai,
Collectorate, Chepauk,
Chennai 600 005.

6. The P.A. (General) to the
Collector of Chennai,
Collectorate, Chepauk,
Chennai 600 005. .. Respondents

Writ Appeal against the order of the learned single Judge (P. Sathasivam) dated 5.12.2001 made in W.P.No.22267 of 1993.

!For Appellants : Mr.M. Sekar

^For Respondents 1-2 : Mr.C. Vijayakumar

For Respondents 3 to 10: Mr.D. Krishnakumar
Special Govt. Pleader

:J U D G M E N T

(Judgment of the Court was made by P.K. MISRA, J.)

Heard Mr.M. Sekar for the appellants, Mr.C. Vijayakumar for the respondents 1 & 2 and Mr.D. Krishnakumar, Special Govt. Pleader for the respondents 3 to 10.

2. The appeal is directed against the order of the learned single Judge in W.P.No.22267 of 1993 directing the appellants to pay a compensation of Rs.1 lakh to the respondent No.1 on account of death of her son in custody.

3. The said writ petition was filed by the present respondents 1 & 2 on the allegation that the son of the respondent No.1 was illegally taken into custody by Railway Police and subsequently expired in custody on account of torture.

4. A counter affidavit had been filed on behalf of the present appellants wherein the allegation of torture has been denied. However, in the counter affidavit it had been admitted that the deceased had been apprehended on 1.9.1991 at about 00.30 hours in connection with Cr.Nos.15/91 and 22/91 and had been brought to their Railway Protection Force Station for interrogation. It is further indicated that the deceased was secured in the lock-up of Tondiarpet Marshalling Yard RPF Station at about 4.30 hours on 1.9.1991 and at about 5.00 hours he was found dead in the lock-up. It is further indicated that inquest was held on the same day and thereafter post-mortem was conducted and the body was handed over to the father of the deceased on 2.9.1991.

5. Learned single Judge taking into consideration the specific averments made on behalf of the writ petitioner and considering the fact that the deceased had been taken into custody and had admittedly died in custody and the fact that inquest and post-mortem reports were not available to the Court, held that the present appellants were liable to pay compensation on account of the death of the deceased while in police custody.

6. In the appeal, it is contended on behalf of the appellants that as per the communication received from the State Government and the officials of the State Government, the death was due to natural causes and in the absence of any positive proof of torture, the direction to pay compensation was uncalled for.

7. Before considering the questions raised by the learned counsel appearing for the State Government, it is necessary to notice some of the

relevant decisions of the Supreme Court throwing light on the question relating to payment of compensation.

8. In 1983(4) SCC 141 (RUDUL SAH v. STATE OF BIHAR), the Supreme Court observed that compensation for deprivation of a fundamental right can be guaranteed in a petition under Article 32 of the Constitution. It was observed :-

 . . . It is true that Article 32 cannot be used as a substitute for the enforcement of rights and obligations which can be enforced efficaciously through the ordinary processes of courts, civil and criminal. A money claim has therefore to be agitated in and adjudicated upon in a suit instituted in a court of lowest grade competent to try it. But the important question for our considerations is whether in the exercise of its jurisdiction under Article 32, this Court can pass an order for the payment of money if such an order is in the nature of compensation consequential upon the deprivation of a fundamental right. The instant case is illustrative of such cases . . .
. . . The petitioner could have been relegated to the ordinary remedy of a suit if his claim to compensation was factually controversial, in the sense that a civil court may or may not have upheld his claim. But we have no doubt that if the petitioner files a suit to recover damages for his illegal detention, a decree for damages would have to be passed in that suit, though it is not possible to predicate, in the absence of evidence, the precise amount which would be decreed in his favour. In these circumstances, the refusal of this Court to pass an order of compensation in favour of the petitioner will be doing mere lip-service to his fundamental right to liberty which the State Government has so grossly violated. Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of this Court were limited to passing orders to release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulct its violators in the payment of monetary compensation. Administrative sclerosis leading to flagrant infringements of fundamental rights cannot be corrected by any other method open to the judiciary to adopt. The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which prevent for their protection the powers of the State as a shield. If civilisation is not to perish in this country as it has perished in some others too well known to suffer mention, it is necessary to educate ourselves into accepting that, respect for the rights of individuals is the true bastion of democracy. Therefore, the State must have repair the damage done by its officers to the petitioner s rights. It may have recourse against those officers.

9. In Bhagalpur Blinding cases : KHATRI (II) v. STATE OF BIHAR (19 81 (1) SCC 627) and KHATRI (IV) v. STATE OF BIHAR (1981(2) SCC 493), the Supreme Court held that in a case of violation of the right to life and personal liberty, the courts should be required to forge new tools and devise new remedies for the purpose of upholding the fundamental rights.

10. In NILABATIBEHERA v. STATE OF ORISSA AND OTHERS (1993(2) SCC 74 6, the Supreme Court while reiterating the aforesaid principles, observed :-

 . . . If the guarantee that deprivation of life and personal liberty cannot be made except in accordance with law, is to be real, the enforcement of the right in case of every contravention must also be possible in the constitutional scheme, the mode of redress being that which is appropriate in the facts of each case. This remedy in public law has to be more readily available when invoked by the have-nots, who are not possessed of the wherewithal for enforcement of their rights in private law, even though its exercise is to be tempered by judicial restraint to avoid circumvention of private law remedies, where more appropriate.

It was further observed :-

 We may also refer to Article 9(5) of8 the International Covenant on Civil and Political Right, 1966 which indicates that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right.

Justice Anand in his concurring decision observed:-

 It is axiomatic that convicts, prisoners or undertrials are not denuded of their fundamental rights under Article 21 and it is only such restrictions, as are permitted by law, which can be imposed on the enjoyment of the fundamental right by such persons. It is an obligation of the State to ensure that there is no infringement of the indefeasible rights of a citizen to life, except in accordance with law, while the citizen is in its custody. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, undertrials or other prisoners in custody, except according to procedure established by law. There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life. His liberty is in the very nature of things circumscribed by the very fact of his confinement and therefore his interest in the limited liberty left to him is rather precious. The duty of care on the part of the State is strict and admits of no exceptions. The wrongdoer is accountable and the State is responsible if the person in custody of the police is deprived of his life except according to the procedure established by law. . . .

11. In 1995(4) SCC 262 (STATE OF MADHYA PRADESH v. SHYAMSUNDER TRIVEDI AND OTHERS) arising out of a prosecution under Section 302 IPC against police officials, while considering the question of standard of proof required in such cases relating to custodial death, it was observed :-

 . . . The High Court erroneously overlooked the ground reality that rarely in cases of police torture or custodial death, direct ocular evidence of the complicity of the police personnel would be available, when it observed that direct evidence about the complicity of these respondents was not available. Generally speaking, it would be police officials alone who can

only explain the circumstances in which a person in their custody had died. Bound as they are by the ties of brotherhood, it is not unknown that the police personnel prefer to remain silent and more often than not even pervert the truth to save their colleagues, and the present case is an apt illustration, as to how one after the other police witnesses feign ed ignorance about the whole matter.

It was further observed :-

 . . . The exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt, by the prosecution, ignoring the ground realities, the fact-situations and the peculiar circumstances of a given case, as in the present case, often results in miscarriage of justice and makes the justice delivery system a suspect. In the ultimate analysis the society suffers and a criminal gets encouraged. Tortures in police custody, which of late are on the increase, receive encouragement by this type of an unrealistic approach of the courts because it reinforces the belief in the mind of the police that no harm would come to them, if an odd prisoner dies in the lock-up, because there would hardly be any evidence available to the prosecution to directly implicate them with the torture. The courts must not lose sight of the fact that death in police custody is perhaps one of the worst kind of crimes in a civilised society, governed by the rule of law and poses a serious threat to an orderly civilised society. Torture in custody flouts the basic rights of the citizens recognised by the Indian Constitution and is an affront to human dignity. Police excesses and the maltreatment of detainees/undertrial prisoners or suspects tarnishes the image of any civilised nation and encourages the men in Khaki to consider themselves to be above the law and sometimes even to become law unto themselves. Unless stern measures are taken to check the malady, the foundations of the criminal justice delivery system would be shaken and the civilization itself would risk the consequence of heading towards perishing. The courts must, therefore, deal with such cases in a realistic manner and with the sensitivity which they deserve, otherwise the common man may lose faith in the judiciary itself, which will be a sad day.

12. In AIR 2000 SC 3421 (AJAB SINGH AND ANOTHER v. STATE OF UTTAR PRADESH AND OTHERS), the Supreme Court while dealing with a similar matter in a petition under Article 32 of the Constitution, the Supreme Court observed :

 If we may be permitted to use the same words, what appears to us to be a concocted story is that set out in the respondents affidavits. They are, to our mind, desperate attempts to avoid responsibility for acts committed while Rishipal was in judicial custody. There can be no doubt that the respondents have not investigated the cause of death of Rishipal as they ought to have done or that, at any rate, they have not placed all relevant material before this Court. They have attempted to pull the wool over the eyes of this Court. We do not appreciate the death of persons in judicial

custody. When such deaths occur, it is not only to the public at large that those holding custody are responsible they are responsible also to the Courts under whose orders they hold such custody. . . .

13. Most of the decisions already noted have been categorised and comprehensive guidelines have been laid down in the case of D.K. BASU v. STATE OF WEST BENGAL (A.I.R. 1997 SC 610).

14. In the light of the observations made by the Supreme Court in the decisions cited above, the facts and circumstances of the present case are to be examined. In the present case, we are not concerned with a criminal trial where the prosecution is supposed to establish the guilt of the accused beyond all reasonable doubts. We are concerned with a plea for payment of compensation in a case of admitted custodial death. It is to be examined whether in the facts and circumstances of the present case, the petitioner, the mother of the deceased is to be driven to a Civil Court. Even if a case is filed in a civil court, such case has to be decided on the basis of preponderance of probability. In the background of the admitted fact that the deceased was taken into custody, was interrogated and found dead within a short span of about 4 to 5 hours, in the absence of any satisfying material produced on behalf of the contesting respondents that the death was on account of natural causes, must be taken to be a custodial death by applying any standard of proof.

15. It is not disputed that the deceased, who was aged about 28 years, had been taken into custody and died while he was in police custody within a short span of five hours from the time of his detention. The incident had attracted much attention at that time and obviously the parents of the deceased had been pestering various authorities for justice. In such a background, normally one would have expected the authorities to preserve various official documents including the inquest report, post-mortem report and the enquiry report, if any, allegedly prepared by the Revenue Divisional Officer. As rightly observed by the learned single Judge, the writ petition had been entertained during the month of December, 1993 and notices were served very soon thereafter and the Respondents ought to have preserved the relevant documents. It is of course true that subsequently a plea was advanced that the records/documents were destroyed. However, such a plea was not accepted, and in our opinion rightly, by the learned single Judge. In view of the admitted fact that the death occurred while the deceased was in custody, the burden was obviously on the present appellants/their subordinate officials to produce the acceptable materials to indicate that the death was on account of natural causes. It should be remembered that ordinarily a young man in his 20s does not expire suddenly due to natural causes. The fact that the deceased had been interrogated and had died within a short span of about five hours of his being taken into custody itself creates grave suspicion regarding acceptability of such an excuse of natural death. Nonproduction of the minimum material in the shape of inquest report/postmortem report only adds to such suspicion. In the absence of any prima facie acceptable material, the inevitable conclusion is that the deceased must have died on

account of torture.

16. It is true that the post-mortem report and inquest report are not available. It is true that there is no direct material in support of the allegation that the deceased was subjected to any torture. However, since admittedly the death took place while the deceased was in policy custody, it is for the police officials or the concerned Government to place materials on record to prove that the death was due to natural causes as claimed by them.

17. Having regard to all these aspects, we have no hesitation to uphold the findings of the learned single Judge and the direction regarding payment of compensation. It is not disputed that during pendency of the appeal, a sum of Rs.50,000/- has been disbursed to the respondent No.1. In the facts and circumstances of the case, we direct that balance amount of Rs.50,000/- with interest at the rate of 9%, calculated from the date of expiry of 12 weeks from the date of the order of the learned single Judge, shall be paid to the respondent No.1. This direction should be complied within a period of three months from the date of receipt of the present order.

18. Subject to the aforesaid direction, the writ appeal is dismissed. No costs.

Index : Yes
Internet: Yes

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To

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